In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1557

PHILIPO CASAMENTO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the evidence was insufficient to sustain his conviction for conspiracy, and that a prior consistent identifying statement was improperly introduced into evidence.

After a jury trial in the United States District Court for the Southern District of New York, petitioner and eleven co-defendants were convicted of conspiracy to import, sell and distribute heroin and to possess heroin with intent to distribute, in violation of 21 U.S.C. (1964 ed.) 173 and 174, and 21 U.S.C. 812, 841(a)(1) and (b)(1)(A), and 960(a)(1) and (b)(1). Petitioner was sentenced to a term of fifteen years' im-

prisonment and three years of special parole. The court of appeals affirmed (Pet. App. A; 493 F. 2d 1398).

Evidence at trial established petitioner's participation in a scheme to purchase, for resale, 50 kilograms of heroin for $550,000 cash. Co-conspirators Claude Pastou and Michel Nicoli testified for the government.

Pastou testified that he was an established courier and forwarder for a vast international drug refining and smuggling network whose activities spanned three continents (Tr. 3–85). On orders from narcotics financier Lucien Sarti, Pastou traveled from South America to New York with instructions to contact Michel Nicoli, who would furnish the address of a new buyer. The address was that of petitioner's Brooklyn, New York cheese store (Tr. 85–103, 110–111). Pastou went there and, as previously arranged, introduced himself to a man there as "Roberto." Despite the lack of a common language, Pastou and the man, later identified as petitioner, communicated using a combination of hand signals, Italian (of which Pastou spoke a little and petitioner spoke a dialect), and Spanish (Tr. 109–114).

After petitioner had made a telephone call, another man (who later identified himself as "Carlos") arrived, then left with Pastou (Tr. 113–115). They drove a few blocks and stopped at a coin telephone, where "Carlos" telephoned Nicoli in Brazil, apparently to confirm Pastou's identity as the individual who would deliver the heroin (Tr. 118–121). "Carlos" returned to petitioner's store, and conferred with him out of Pastou's hearing. Pastou advised the two that he would

return in 8 to 10 days with the "merchandise" (Tr. 122–125).

Approximately one week later Pastou met with an airline pilot who was responsible for smuggling the heroin, and agreed on price and delivery terms. Pastou returned to petitioner's store, where petitioner gave him a brown paper bag containing $90,000 advance money, which Pastou then gave to the pilot, along with the key and receipt for a rental car for the pilot's use in transporting the heroin (Tr. 132–143).

The next day Pastou obtained the heroin, drove to petitioner's store in the rental car, and informed him that the merchandise was in the car. Petitioner told Pastou to follow in the rental car as petitioner drove in his car. Petitioner led Pastou to another location where plywood crates containing 25 kilograms of heroin were transferred to petitioner's car; the remaining 25 kilograms were delivered in the same manner the next day (Tr. 143–154).

Approximately 3 days later Pastou returned to petitioner's store. Petitioner drove off in Pastou's car, returned about 20 minutes later, and advised that the money was in the trunk of the car. After returning to his Manhattan hotel, Pastou found a suitcase in the trunk containing $460,000 in $50 and $100 bills, representing the balance owed on the transaction. Pastou took part of the money due him as commission and returned to Brazil (Tr. 157–163).

1. Petitioner contends that the evidence was insufficient to support his conspiracy conviction because the government allegedy failed to prove his knowledge that what he was buying from Pastou was narcotics.

The claim is without merit. The evidence against petitioner, viewed in the light most favorable to the government (see *Glasser* v. *United States,* 315 U.S. 60, 80), was more than sufficient. It showed the existence of a massive conspiracy to produce, refine, and market drugs, and petitioner's knowing connection with the operation as a distributor. See *United States* v. *Marrapese,* 486 F. 2d 918, 921 (C.A. 2); *United States* v. *Cohen,* 197 F. 2d 26 (C.A. 3).

Proof offered at trial established that principals in the drug operation arranged for delivery by Pastou of 50 kilograms of heroin to a buyer, whose address and description matched petitioner's. As the narcotics producers' representative, Pastou went to petitioner's store and identified himself by a code name. Petitioner summoned an associate and verified Pastou's identity with his superiors in Brazil. The arrangements for the delivery were executed according to plan, and the heroin was delivered to petitioner for $550,000 cash within 2 weeks after Pastou's arrival in New York.

The jury was entitled to infer that possession of narcotics of such value would not be entrusted to an innocent party by persons who well understood the purpose of the transaction. See *United States* v. *Vasquez,* 429 F. 2d 615 (C.A. 2). It is particularly clear that petitioner's possession of the narcotics was not innocent when he personally took delivery and paid the $550,000 for the goods after taking elaborate precautions to protect the covert nature of the transaction. See *United States* v. *Pui Kan Lam,* 483 F. 2d 1202, 1208 (C.A. 2), certiorari denied, 415 U.S. 984. In brief, the jury was entitled to reject the various

innocent explanation offered for petitioner's conduct in view of the wealth of evidence from which it could infer guilt.[1]

Petitioner's argument that the government failed to prove that he knew the heroin was imported, as alleged in paragraph 2 of the indictment, is likewise unpersuasive. The indictment charged a conspiracy among 12 persons to sell, distribute or possess with intent to distribute, and import narcotics. Since the government amply proved both the existence of a conspiracy (one object of which was illegal importation of heroin) and petitioner's knowing participation in it, it had no obligation to prove specifically that petitioner knew the heroin was imported. *United States* v. *Agueci*, 310 F. 2d 817, 825 (C.A. 2), certiorari denied, 372 U.S. 959.

In any event, the record supports an inference that petitioner knew the heroin was imported. He had been in contact with the principals in Brazil to arrange for the sale, and apparently had directed "Carlos" to check back by telephoning Brazil upon Pastou's arrival. Moreover, possession of heroin permits the inference that the defendant knew it was imported. *Turner* v. *United States*, 396 U.S. 398.

2. Petitioner contends that the trial court erred in permitting the government to introduce Pastou's testimony concerning his prior identification of petitioner. On cross-examination of Pastou, the defense offered

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[1] In particular, the jury was entitled to reject petitioner's contention that the lack of a common language rendered meaningful communication impossible, since the government offered testimony that sufficient, if not eloquent, communication was effected in imperfect Spanish and Italian and by hand signals.

an affidavit in French signed by Pastou, which recited in its last paragraphs that Pastou had delivered the heroin not to petitioner, but to "Frank" (also known as "Carlos"), the man in petitioner's store who had gone with Pastou to telephone Brazil (Tr. 236). At trial Pastou stated he had not drafted the affidavit (which had been prepared in English, which Pastou does not understand, and later translated into French), and read only the beginning of the affidavit before signing it (Tr. 235–236).

To refute the suggestion that Pastou had previously claimed he had delivered the heroin to "Frank," the government offered Pastou's testimony on redirect, and the testimony of Agent Pavlick, concerning a prior consistent identification of petitioner by Pastou as the man to whom he had delivered the heroin, made months before his signing of the affidavit (Tr. 268–282). The jury also had before it Pastou's grand jury testimony and his statement to the Bureau of Narcotics and Dangerous Drugs, both introduced without objection, identifying petitioner as the person to whom he had delivered the heroin (DX C; GX 15, 16; Tr. 252, 256–257, 259).

Petitioner argues that the principle announced in *United States* v. *Sherman*, 171 F. 2d 619 (C.A. 2), certiorari denied *sub nom. Grimaldi* v. *United States*, 337 U.S. 931, barred the introduction of the prior consistent identifications. This reliance is misplaced, since the testimony here concerned a prior consistent identification, admissible as an exception to the general rule in *Sherman* concerning only prior consistent

statements. *United States* v. *Miller,* 381 F. 2d 529, 538 (C.A. 2), certiorari denied, 392 U.S. 929.

In *Sherman,* an inconsistent statement was made at the moment of arrest; the objectionable consistent statement was not made until two weeks later. The rationale of that case was that to allow introduction of a prior consistent statement to rebut a still earlier inconsistent statement would have amounted to a cataloging of all the pretrial statements, and would have been both pointless and confusing.

In the instant case the facts were quite different. Pastou, after deciding to cooperate, made at least five separate statements that identified petitioner as the buyer. When the defense introduced an affidavit impeaching Pastou's trial testimony, it was proper to permit rehabilitation of the witness by his consistent statements antedating the affidavit. See *Felice* v. *Long Island Railroad Company,* 426 F. 2d 192 (C.A. 2).

Moreover, since Pastou's testimony was impeached on cross-examination by the fact of the government's agreement to bring his family to the United States from Brazil, the identification testimony was properly admitted as a prior consistent statement antedating his alleged motive for fabricating his testimony. *United States* v. *DiLorenzo,* 429 F. 2d 216, 220 (C.A. 2), certiorari denied, 402 U.S. 950.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1974.

U.S. GOVERNMENT PRINTING OFFICE: 1974